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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

MARK A. SIMON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

==========

Petition for Writ of Certiorari
To the United States Court of Appeals
for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is evidence that a person structured $131,000 in cash into a single account in his own name, in 14 deposits at eight different branches of the same bank over a one week period, for the purpose of evading the bank's currency reporting obligation, sufficient to prove that he knew that his own conduct was illegal, as required under Ratzlaf v. United States, 510 U.S. 135 (1994)?

TABLE OF CONTENTS*

QUESTIONS PRESENTED i
LIST OF ALL PARTIES . . . . . iiin
INDEX TO APPENDIX iv
TABLE OF AUTHORITIES iv

PETITION
OPINIONS BELOW 1
JURISDICTION 1
STATUTES AND RULES 2
STATEMENT OF THE CASE
a. Procedural History 5
Jurisdiction of court below . 11
b. Statement of Facts 11

REASON FOR GRANTING THE WRIT
The decision below conflicts with the decision of three other circuits on what the government must prove to establish "willfulness" under Ratzlaf, applying this Court's opinion in such a way as to strip it of all meaning. .. 13
CONCLUSION 21

---

*.

LIST OF ALL PARTIES

The caption of the case in this Court contains the names of all parties (Mark A. Simon and the United States).

INDEX TO APPENDIX

A. Opinion of the Court of Appeals A1-A19

B. Oral Ruling of the District Court denying motion for judgment of acquittal at trial B1-B2

C. Oral Ruling of the District Court denying renewed motion for judgment of acquittal at sentencing C1-C3

D. Order Denying Rehearing D1-D2

TABLE OF AUTHORITIES

Cases:

Bullen v. Wisconsin,
240 U.S. 625 (1916) 20

Caming v. United States, 889 F.Supp. 736
(S.D.N.Y. 1995) 16, 17

Cheek v. United States,
498 U.S. 192 (1991) 19

Lawrence v. Chater, 516 U.S. --,
133 L.Ed.2d 545 (1996) (per curiam)18

Liparota v. United States,
471 U.S. 419 (1985).....19

Ratzlaf v. United States,
510 U.S. 135 (1994) ..... passim

Spies v. United States,
317 U.S. 492 (1943) 20

Staples v. United States, 511 U.S. --,
128 L.Ed.2d 608 (May 23, 1994) ... 19

Stutson v. United States, 516 U.S. --,
133 L.Ed.2d 571, 116 S.Ct. 600
(1996) (per curiam) 18
United States v. Caming,
968 F.2d 232 (2d Cir. 1992) .. 16, 17
United States v. Dichne, 612 F.2d 632
(2d Cir. 1979), cert. denied,
445 U.S. 928 (1980) 14-16
United States v. Hurley, 63 F.3d 1
(1st Cir. 1995), cert. denied,
116 S.Ct. 1322, 134 L.Ed.2d 474
(1996) 13
United States v. Isham,
17 Wall. (84 U.S.) 496 (1873) 20
United States v. Ismail, 1996 WestLaw
544464, 96-2 USTC ¶50,510 (4th Cir.,
filed Sept. 26, 1996) 14, 18
United States v. Marder, 48 F.3d 564
(1st Cir.), cert. denied, 115 S.Ct.
1441, 131 L.Ed.2d 320 (1995) 13
United States v. Pomponio,
429 U.S. 10 (1976) (per curiam) .. 20
United States v. Scanio, 900 F.2d 485
(2d Cir. 1990) 5, 6
United States v. Simon, 85 F.3d 906,
77 A.F.T.R.2d 96-2430, 96-2 USTC
¶ 50,358 (2d Cir. 1996) ..... passim
United States v. Vazquez, 53 F.3d 1216
(11th Cir. 1995) 14, 18
United States v. Walker, 25 F.3d 540
(7th Cir.), cert. denied,
115 S.Ct. 371, 130 L.Ed.2d 323 and
115 S.Ct. 531, 130 L.Ed.2d 434
(1994) 13
United States v. Wynn, 61 F.3d 921
(D.C.Cir. 1995) 14, 17, 18

United States v. X-Citement Video, Inc.,
513 U.S. --, 130 L.E.2d 372
(Nov. 29, 1994) 19

Constitution, Statutes and Rules:

18 U.S.C. § 3231 11
28 U.S.C. §§ 1291, 2253 11
28 U.S.C. § 1254 2
28 U.S.C. § 2255 17
31 U.S.C. § 5313 6
31 U.S.C. § 5316 15
31 U.S.C. § 5322 6
31 U.S.C. § 5324(3) 6, 19
Fed.R.App.P. 4(b) 11
S.Ct. Rule 13.1 2

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MARK A. SIMON respectfully petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on May 29, 1996, affirming his conviction in the Eastern District of New York for willful structuring of currency transactions.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit, filed on May 29, 1996 (Meskill, J., with Van Graafeiland, J.), is attached as Appendix A. United States v. Simon, 85 F.3d 906, 77 A.F.T.R.2d 96-2430, 96-2 USTC ¶ 50,358 (2d Cir. 1996). Judge Winter dissented. App. A15 to -19; 85 F.3d 911-12. There is no published opinion of the District Court. The rulings of the district court on petitioner's motions for judgment of acquittal are reproduced and attached as Appendices B and C.

JURISDICTION

The Judgment and Opinion of the United States Court of Appeals for the Second Circuit were filed May 29, 1996. Appx. A. On July 25, 1996, the court of appeals denied the applicant's petition

for rehearing. Appx. D. This petition is filed within 90 days thereafter. Rule 13.1. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES AND RULES INVOLVED

The Bank Secrecy Act, prior to its amendment in 1994, provided, in part:

> **§ 5313. Reports on domestic coin and currency transactions**
>
> (a) when a domestic financial institution is involved in a transaction for the payment, receipt, or transfer of United States coins or currency (or other monetary instruments the Secretary of the Treasury prescribes), in an amount, denomination, or amount and denomination, or under circumstances the Secretary prescribes by regulation, the institution and any other participant in the transaction the Secretary may prescribe shall file a report on the transaction at the time and in the way the Secretary prescribes. ...

31 U.S.C. § 5313.[1]

---

[1] The applicable regulations of the Secretary of the Treasury, in turn, require currency transaction reports (CTRs) to be filed by domestic financial institutions, whenever coin or currency in an amount more than $10,000 is deposited, withdrawn, or exchanged,

§ 5322. Criminal penalties

(a) A person willfully violating this subchapter or a regulation prescribed under this subchapter ... shall be fined not more than $250,000, or imprisoned for not more than five years, or both.

(b) A person willfully violating this subchapter or a regulation prescribed under this subchapter ..., while violating another law of the United States or as part of a pattern of illegal activity involving transactions of more than $100,000 in a 12-month period, shall be fined not more than $500,000, imprisoned not more than 10 years, or both.

31 U.S.C. § 5322.

§ 5324. Structuring transactions to evade reporting requirement prohibited

No person shall for the purpose of evading the reporting requirements of section 5313(a) with respect to such transaction:

* * * *

(cont'd)

unless the transaction has been exempted in accordance with the regulations. 31 C.F.R. § 103.22(a)(1).

(3) structure or assist in structuring, or attempt to structure or assist in structuring, any transaction with one or more domestic financial institutions.

31 U.S.C. § 5324 (as added October 27, 1986).

The Treasury Department's implementing regulations explicate the statutory term "structure ... any transaction" as follows:

> a person structures a transaction if that person, acting alone, or in conjunction with, or on behalf of, other persons, conducts or attempts to conduct one or more transactions in currency, in any amount, at one or more financial institutions, on one or more days, in any manner, for the purpose of evading the reporting requirements under section 103.22 of this Part. "In any manner" includes, but is not limited to, the breaking down of a single sum of currency exceeding $10,000 into smaller sums, including sums at or below $10,000 or the conduct of a transaction, or series of currency transactions, including transactions at or below $10,000. The transaction or transactions need not exceed the $10,000 reporting threshold at any single finan-

cial institution on any single day in order to constitute structuring within the meaning of this definition.

31 C.F.R. § 103.11(p).

STATEMENT OF THE CASE

This petition presents an important question concerning the implementation and application of this Court's decision in Ratzlaf v. United States, 510 U.S. 135 (1994), on which the Circuits are divided, as was the court of appeals panel below.

a. Procedural History

On April 29, 1993, the government filed a one-count Information in the Eastern District of New York, charging petitioner with the instant offense. Petitioner waived indictment and entered a plea of guilty. Sentencing was held before U.S. District Judge Carol B. Amon on December 1, 1993. Judge Amon sentenced petitioner to serve 15 months' imprisonment, inter alia. Voluntary surrender for service of this sentence was set for February 11, 1994.

On January 11, 1994, after sentencing but before petitioner commenced serving the sentence, this Court announced its decision in Ratzlaf v. United States, 510 U.S. 135 (1994), which overruled the Second Circuit's precedent established in United States v. Scanio, 900 F.2d 485 (2d Cir. 1990), and held

that conduct was not "willful" within the meaning of 31 U.S.C. § 5322 unless the defendant knew his own conduct was unlawful; the newly-discredited Scanio interpretation of the anti-structuring law, under which a defendant's knowledge of the bank's reporting obligation was sufficient, had been the basis of the plea colloquy in petitioner's case. On February 9, Judge Amon entered an order staying execution of the sentence indefinitely pending further order of the court. On April 8, 1994, Judge Amon vacated petitioner's guilty plea and dismissed the information.

On July 14, 1994, shortly before the five-year statute of limitations would have expired, the grand jury returned a one-count indictment restating the dismissed charges: that between July 18, 1989, and July 25, 1989, petitioner had willfully structured currency transactions, in violation of 31 U.S.C. § 5324(3) and 5322, totaling approximately $131,410 in deposits to Citibank, for the purpose of evading the bank's currency reporting obligations established under 31 U.S.C. § 5313.

A one day jury trial was held May 9, 1995, and the jury found petitioner guilty. The district court denied a motion for judgment of acquittal when the government rested. Appx. B. Petitioner filed a timely written motion for judgment of acquittal on May 19, which

was denied orally prior to sentencing on August 18. Appx. C. In that regard, Judge Amon stated:

> [T]here was sufficient circumstantial evidence from which the jury could have concluded that Mr. Simon knew that structuring itself violated the law. ...
>
> * * * *
>
> Well, ... the way that these transactions were conducted, and the defendant's level of sophistication[, the court finds] that the circumstances were such that the jury could have inferred that, more than just avoiding a reporting requirement, that the defendant understood that his conduct was illegal. ... It will make an interesting argument, I take it, in the Court of Appeals.

App. C2-C3. The court then sentenced petitioner again to serve 15 months' imprisonment, followed by three years' supervised release, and to pay a $50 special assessment. The district court continued petitioner on bond and stayed his surrender pending appeal. That bond remains in force pending disposition of this petition.

On appeal to the Second Circuit, a divided panel found sufficient evidence and affirmed. The majority held:

> when the method of structuring suggests a significant effort not

only to avoid the bank reporting requirements but to *conceal* the currency structuring *itself* from the authorities, *Ratzlaf's* requirement of "something more" is satisfied. 510 U.S. at ----, 114 S.Ct. at 657.

* * * *

[T]he defendant's conduct in this case suggests not only knowledge of the reporting requirements and an intent to circumvent those requirements, but knowledge of illegality as well. *Contrast Ratzlaf*, 510 U.S. at ---, 114 S.Ct. at 657 (describing the defendant's efforts in obtaining cashier's checks from at least ten different banks immediately after learning from casino that it would have to file a report if it accepted $100,000 in cash as repayment of gambling debt). Here, the undisputed evidence of the defendant's structuring -- of his method of structuring -- supports a reasonable inference that the defendant was attempting to conceal not only his deposits, but also his acts of structuring. In other words, a reasonable jury could infer that the extensive efforts undertaken by the defendant in structuring his cash deposits "undoubtedly [were]

> based on the knowledge that his conduct was unlawful." *Caming v. United States*, 889 F.Supp. 736, 741 (S.D.N.Y. 1995). ...
>
> ... The extensive effort Simon did take in structuring these deposits amply supports a reasonable inference that he was attempting to hide his structuring activities because he knew that his conduct was unlawful.
>
> Finally, we note that this defendant is not an unsophisticated person. He was a licensed stockbroker, and he himself was required, as a stockbroker, to file currency transaction reports with the Treasury Department. *See* 31 U.S.C. § 5315; 31 C.F.R. § 103.11(n)(2) (1995).
>
> ... The jury reasonably could have inferred that this defendant possessed the knowledge and sophistication to understand that his own conduct was unlawful.

Appx. A11, A12-13. Judge Winter, however, dissented, stating that:

> Simon's understanding of the laws regarding the reporting of cash transactions was hardly sophisticated. Simon's fourteen deposits were all made to *a single account in his own name*. For Simon to have expected that daily deposits

totalling over $10,000 would not be detected--the government's, and evidently the jury's, view of his purpose -- he must have been ignorant of the elementary fact that banks tally all deposits during and at the end of the day in order to determine the balance in an account. In short, the government's position is that Simon's sophistication extended to knowledge of the illegality of structuring but did not include a familiarity with bank statements.

Simon's status as a licensed stockbroker adds nothing to the proof regarding his knowledge of the laws regulating structuring. ... The government offered no evidence as to whether Simon ever received cash from a client, ever filled out such a report, or ever received training as to pertinent statutory or regulatory requirements. The government's proof, in short, was the law itself.

... *Ratzlaf*, in overruling our precedents, requires proof beyond a reasonable doubt that Simon knew that structuring was illegal. The government's proof failed to meet this standard. Simon's conduct, the sole evidence offered to show such knowledge, demonstrates at best a

> belief that form -- deposits just under $10,000 at separate branches -- would prevail over substance -- the aggregate deposits in one day -- for purposes of the currency transaction rules. This is not an unreasonable or uncommon belief given our tax or regulatory laws.

Appx. A16, A17, A18-A19. Rehearing was denied. Appx. D. This petition follows.

Statement of Lower Court Jurisdiction Under Rule 14.1(i). The jurisdiction of the court below rested upon 28 U.S.C. §§ 1291 and was timely invoked by notice of appeal filed after entry of judgment. Fed.R.App.P. 4(b). The district court's jurisdiction was properly invoked in this case under 18 U.S.C. § 3231, in that the indictment alleged the commission of a federal criminal offense.

b. Statement of Facts

On five days between July 18, 1989, and July 25, 1989, Mark A. Simon, the petitioner, made at least 14 deposits of United States currency into his own checking account at Citibank of New York. Each of these deposits was in an amount approaching but less than $10,000. He used eight different branches of the bank for his deposits, never visiting the same branch twice on the same day. In each

instance, petitioner gave his own name and business mailing address on the deposit slip. (The address was a private mailbox service on Long Island known as Packaging Plus.) Citibank's inter-branch communication was sufficient to cause a CTR to be filed, as required, for the aggregate deposits made at all branches on each date.

At the time of his arrest, petitioner stated that he was a licensed stockbroker by profession. Asked about the cash deposits he had made in July of 1989, he told the agent that he had, in the words of the agent on direct examination, "structured these deposits to conceal the monies from the government and to avoid having, in his words, special $10,000 form filled out" (sic). CA2 App. 61a. However, the agent's contemporaneous report states that petitioner said that his purpose was "to conceal the monies from the government and avoid filling out that $10,000 special form." CA2 App. 62-63a.

REASON FOR GRANTING THE WRIT

The decision below conflicts with the decisions of three other circuits on what the government must prove to establish "willfulness" under Ratzlaf, applying this Court's opinion in such a way as to strip it of all meaning.

The circuits are deeply divided in their views of what kind of evidence is sufficient to prove a defendant's knowledge of the law, when such knowledge is needed to establish the willfulness element of a criminal offense. The Second Circuit panel majority below held that "The defendant's attempts to conceal his activities amply support a reasonable inference that the defendant knew that his own conduct was unlawful." Appx. A14. Judge Winter disagreed. The panel members' divergent views are echoed in opinions from various circuits.

The circuits are split three to three. The majority's holding below accords with the analyses of the First and Seventh Circuits. United States v. Hurley, 63 F.3d 1, 16 (1st Cir. 1995), cert. denied, 116 S.Ct. 1322, 134 L.Ed.2d 474 (1996); United States v. Marder, 48 F.3d 564, 574 (1st Cir.), cert. denied, 115 S.Ct. 1441, 131 L.Ed.2d 320 (1995); United States v. Walker, 25 F.3d 540, 548 n.8 (7th Cir.), cert. denied, 115 S.Ct. 371, 130 L.Ed.2d 323 and 115 S.Ct. 531, 130 L.Ed.2d 434 (1994).

Judge Winter's dissent, on the other hand, echoes reversals of similar convictions by the District of Columbia and Fourth Circuits. See United States v. Ismail, 1996 WestLaw 544464, 96-2 USTC ¶50,510 (4th Cir., filed Sept. 26, 1996) (evidence of course of structuring insufficient to prove knowledge of illegality); United States v. Wynn, 61 F.3d 921, 928 (D.C.Cir. 1995). See also United States v. Vazquez, 53 F.3d 1216, 1224-25 (11th Cir. 1995) (without defendant's own testimony, evidence of structuring conduct would have been insufficient to prove "willful" structuring).

The four Ratzlaf dissenters did not anticipate that it would be as easy as the court below apparently thought to satisfy the "willfulness" requirement. Justice Blackmun's opinion suggests that the ruling would make structuring prosecutions "difficult or impossible," 510 U.S. at ---, 114 S.Ct. at 669 (Blackmun, J., dissenting). The majority responded that knowledge of illegality can be inferred from evidence of the defendant's conduct. 126 L.Ed.2d at 627 n.19, 114 S.Ct. at 663 n.19.

This Ratzlaf footnote cited one case, with apparent approval, as an example of how knowledge of illegality could be inferred from conduct: a prior decision of the Second Circuit, United States v. Dichne, 612 F.2d 632, 636-38 (2d Cir. 1979), cert. denied, 445 U.S.

928 (1980). In that case, the court of appeals upheld convictions for violation of what is now 31 U.S.C. § 5316 (reporting of international transportation of monetary instruments).

The Dichne court noted that the conspirators in that case "conducted themselves in a highly secretive manner, and also ... show[ed] a knowledge of, and a desire to avoid, reporting requirements in general." 612 F.2d at 638. The court also found significant that "Dichne himself was a knowledgeable export-import broker ...." Id. at 637-38. Those factors are all arguably comparable to evidence in petitioner's case. But Dichne held that "these secretive acts alone would not sufficiently support a judgment of conviction ...." Id. at 638. Rather, the court found essential "the significant affirmative steps taken by the Customs Service to advise Dichne and other travelers of the reporting requirements of the Act," id., namely public address announcements and brightly colored posters. The evidence below was directly to the contrary. The IRS case agent conceded before the jury that he had never seen, "in any bank in the United States of America," a notice or warning to customers that structuring transactions to evade the CTR reporting requirements is unlawful. CA2 App. 66a.

Dichne also contradicts the panel's reliance on petitioner's possession of a

stockbroker's license as a basis to infer knowledge. "Dichne himself was a knowledgeable export-import broker ...." 612 F.2d at 637-38. Yet the court held that Dichne's status and experience were nevertheless insufficient proof of knowledge of the law, despite being coupled with acts of concealment, without the evidence of notice that existed there. Id. at 638. The government's strategy of keeping the law secret from potential violators -- see Judge Winter's dissent, Appx. A19; Ratzlaf, 126 L.Ed.2d at 621 n.6 -- therefore must fail, and so must this prosecution, where "willfulness" as defined in Ratzlaf is the statutory standard.

It is ironic that the panel majority below relies in part on Caming v. United States, 889 F.Supp. 736 (S.D.N.Y. 1995). Appx. A13. In United States v. Caming, 968 F.2d 232 (2d Cir. 1992), the court of appeals, on direct appeal in that same case, noted that:

> Two bank managers testified that signs informing bank customers of the $10,000 currency transaction reporting requirement and the criminal penalties for structuring a transaction to avoid those requirements were displayed at the branch during the period when Caming was depositing funds into the accounts. These witnesses further testified that

> a sign that Caming was looking at in two bank surveillance photographs was such a sign.

Id. at 234. It was on the basis of this "evidence directly proving that Caming knew that his conduct was unlawful," that the district court denied Caming's post-Ratzlaf motion under 28 U.S.C. § 2255 to vacate his conviction. Caming v. United States, supra, 889 F.Supp. at 740.

The circumstantial evidence against petitioner is considerably less than that found by the D.C. Circuit to be insufficient to convict. In United States v. Wynn, 61 F.3d 921, 927-29 (D.C. Cir. 1995), clothing retailers were convicted of various money laundering offenses for their knowledgeable dealings with drug traffickers. Their convictions for willful structuring, however, were reversed in light of Ratzlaf, despite "abundant evidence" of their awareness of the banks' obligations and of the illegal source of their customers' cash. Judge Buckley's opinion recognized:

> Permitting a violation of the law -- i.e., structuring -- alone to serve as sufficient evidence of knowledge of the law would effectively merge the two elements .... The jury, of course may infer knowledge of the law from circumstantial evidence, but for the willfulness requirement to be more than 'essentially ...

> surplusage,' ...[Ratzlaf], 114 S.Ct. at 659, that evidence must suggest knowledge of the anti-structuring law as distinct from knowledge of financial institutions' reporting requirements.

61 F.3d at 928. This Court should grant certiorari and adopt Judge Winter's dissent below, as supported by Judge Buckley's well-reasoned decision for the D.C. Circuit in Wynn, Judge Carnes's opinion for the Eleventh Circuit in Vazquez, and the Fourth Circuit's in Ismail.[2] Indeed, a summary GVR disposition might be appropriate. See Stutson v. United States, 516 U.S. --, 133 L.Ed.2d 571, 575, 116 S.Ct. 600 (1996) (per curiam); Lawrence v. Chater, 516 U.S. --, 133 L.Ed.2d 545 (1996) (per curiam).

For two reasons, this Court should not decline to grant certiorari in this case on the basis of Congress's later amendment of 31 U.S.C. § 5322 to elim-

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[2] It may be possible to distinguish each of these cases factually from one another, as the majority attempts to do in Ismail (leading Judge Williams to concur in the judgment only), but it does not follow from any such effort that the circuits' cases are ultimately consistent with one another; they simply cannot be reconciled in principle.

inate the "willfulness" element in prosecutions for structuring under id. § 5324. See Appx. A7-A8 n.3. First, the issue involved in this kind of case -- what evidence suffices as proof of the intentional violation of a known legal duty -- does not arise only in pre-1994 structuring prosecutions governed directly by Ratzlaf v. United States, 510 U.S. 135 (1994). Rather, it is common to many malum prohibitum offenses in our increasingly regulated (and over-criminalized) society.

A number of this Court's recent cases have shed light on the fundamental criminal law principle that in many instances a defendant's knowledge of the applicable law is the only state of mind that serves to turn otherwise innocent (albeit knowing and deliberate) conduct into a legitimately punishable act. See Cheek v. United States, 498 U.S. 192 (1991); Liparota v. United States, 471 U.S. 419 (1985); see also Staples v. United States, 511 U.S. --, 128 L.Ed.2d 608, 624 (May 23, 1994). As the Chief Justice recently wrote for the Court in United States v. X-Citement Video, Inc., 513 U.S. --, 130 L.Ed.2d 372, 381 (1994), "the presumption in favor of a scienter requirement should apply to each of the statutory elements which criminalize[s] otherwise innocent conduct."

The second reason this Court should not ignore the split in the circuits

concerning the government's burden of proof under Ratzlaf is that the 1994 amendment will not make the problem go away. Congress deleted the "willfulness" element, but left untouched the requirement of an "intent to evade" the bank's reporting requirement. Without knowledge of the illegality of one's own conduct, such "intent to evade" (as opposed to a mere intent to avoid) cannot exist. See Ratzlaf, 126 L.Ed.2d at 625, discussing United States v. Isham, 17 Wall. (84 U.S.) 496 (1873); accord, United States v. Pomponio, 429 U.S. 10, 12 (1976) (per curiam); Spies v. United States, 317 U.S. 492, 495-97 (1943); see also Bullen v. Wisconsin, 240 U.S. 625, 630-31 (1916) (Holmes, J.).

Certiorari should be granted to resolve the split in the circuits and to establish that evidence proving only knowledge of a regulation and a course of conduct to avoid its impact is insufficient to establish knowledge of the illegality of such conduct.

CONCLUSION

For the foregoing reasons, petitioner MARK A. SIMON respectfully prays that this Court grant his petition for a writ of certiorari, reverse the judgment below, and remand for entry of a judgment of acquittal.

Respectfully submitted,

By: PETER GOLDBERGER
STEPHEN ROBERT LaCHEEN
Counsel of Record
Attorneys for Petitioner

October 22, 1996.

APPENDIX A

UNITED STATES of America, Appellee,

v.

Mark A. SIMON, Defendant-Appellant.

No. 1110, Docket 95-1514.
United States Court of Appeals,
Second Circuit.
Argued Feb. 28, 1996.
Decided May 29, 1996.
85 F.3d 906, 77 A.F.T.R.2d 96-2430,
96-2 USTC ¶ 50,358

------- Page 85 F.3d 907 follows -------

Stephen Robert LaCheen, Philadelphia, PA (Peter Goldberger, Ardmore, PA, of counsel), for Appellant.

Eric Corngold, Assistant United States Attorney (Zachary W. Carter, United States Attorney for the Eastern District of New York, Peter A. Norling, Assistant United States Attorney, Eastern District of New York, Brooklyn, NY, of counsel), for Appellee.

Before: VAN GRAAFEILAND, MESKILL and WINTER, Circuit Judges.

MESKILL, Circuit Judge:

This is an appeal from a judgment of conviction by a jury entered August 18, 1995 in the United States District Court for the Eastern District of New York, Amon, *J.* The defendant, Mark Simon, was convicted of structuring cash transac-

tions to evade currency reporting requirements in violation of 31 U.S.C. §§ 5322 and 5324(3).[1] On appeal, Simon contends that the evidence adduced at trial was insufficient to establish knowledge of illegality, as required by *Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994). Because we conclude that there was sufficient evidence for a jury to infer knowledge of illegality, we affirm the judgment of conviction.

---

[1] Subsequent to the conduct which formed the basis of the indictment, Congress recodified § 5324(1)-(3) as § 5324(a)(1)-(3), without substantive change. Congress also added subsection (b) to impose the prohibitions of subsection (a) in the international currency context. *See* Annunzio-Wylie Anti-Money Laundering Act, Pub.L. No. 102-550, tit. XV, § 1525(a), 106 Stat. 4064 (1992) (codified at 31 U.S.C. § 5324). The grand jury indicted Simon on July 14, 1994 under the law in effect at the time of the conduct charged in the indictment. For consistency and clarity, we refer to the codification in effect at the time of the conduct charged in the indictment. *See* 31 U.S.C. § 5324 (1988 & Supp. V 1993). *See also infra* n.3 (discussing 1994 amendment).

BACKGROUND

Between July 18, 1989 and July 25, 1989, Simon, a licensed stockbroker, deposited more than $130,000 in cash into one account through 14 deposits at eight Citibank branches located throughout Brooklyn, Nassau County and Suffolk County, New York. More specifically, on Tuesday, July 18, 1989, he made two deposits of $9,730 and $9,620, respectively, at Plainview, Long Island and Melville, Long Island Citibank branches. On Wednesday, July 19, 1989, he made two deposits of $9,000 and $8,800, respectively, at Hicksville, Long Island and Garden City, Long Island Citibank branches. On Thursday, July 20, 1989, he made four deposits of $9,900, $9,900, $9,920 and $9,900, respectively, at 13th Avenue, Brooklyn, 18th Avenue, Brooklyn, Shore Parkway, Brooklyn and Plainview, Long Island Citibank branches.

------- **Page 85 F.3d 908 follows** -------

On Monday, July 24, 1989, he made four deposits of $9,900, $9,700, $9,600 and $9,920, respectively, at 13th Avenue, Brooklyn, 18th Avenue, Brooklyn, Shore Parkway, Brooklyn, and Plainview, Long Island Citibank branches. On Tuesday, July 25, 1989, he made two deposits of $9,920 and $5,400, respectively, at Avenue J, Brooklyn and Plainview, Long Island Citibank branches.

Internal Revenue Service Agent Anthony Curieri arrested Simon on March

3, 1992. At trial, Agent Curieri testified that, after Simon signed a waiver of his Fifth Amendment rights, he questioned Simon about the 1989 cash deposits. According to Curieri's testimony, the defendant admitted that "he structured these deposits to conceal the monies from the government and to avoid having, in his words, [the] special $10,000 form filled out."[2]

At trial, the defendant, who did not testify, conceded, through his counsel, that he structured the cash deposits, as described, with the purpose of avoiding the currency reporting requirements. He denied, however, any knowledge that his conduct was illegal. In other words, he conceded knowledge of bank reporting requirements, but denied any knowledge that it was illegal for him to structure transactions with the purpose of avoiding such requirements.

In her charge to the jury, the district judge made it clear that the jury could not convict the defendant unless the jury found beyond a reasonable

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[2] Defense counsel pointed out, on cross-examination and on appeal, that the agent's contemporaneous report states that the defendant told him that he structured the deposits "to conceal the monies from the government and *avoid filling out* that $10,000 special form."

doubt that the defendant knew that his conduct was illegal. More specifically, she charged the jury as follows:

> The first element of the offense that the government must prove beyond a reasonable doubt is that the defendant knew that Citibank had a duty to report currency transactions in excess of $10,000 and also knew that it was unlawful for the defendant to structure his currency transactions in order to avoid causing such a report to be filed. The act of structuring without knowledge that structuring is unlawful is not a crime.

Similarly, both the prosecution and the defense reminded the jury in summation that the only issue in dispute was whether the defendant knew that his conduct was illegal. The jury convicted.

DISCUSSION

I. *Standard of Review*

[1][2] In reviewing sufficiency of the evidence claims, "we must view the evidence, whether direct or circumstantial, in the light most favorable to the government, crediting every inference that could have been drawn in its favor, ... and we must affirm the conviction so long as, from the inferences reasonably drawn, the jury might fairly have concluded guilt beyond a reasonable doubt." *United States v. Skowronski*, 968 F.2d 242, 247 (2d Cir.1992) (citations

omitted). A defendant challenging the sufficiency of evidence bears "a very heavy burden." *United States v. Nusraty*, 867 F.2d 759, 762 (2d Cir.1989) (quoting *United States v. Young*, 745 F.2d 733, 762 (2d Cir.1984), *cert. denied*, 470 U.S. 1084, 105 S.Ct. 1842, 85 L.Ed.2d 142 (1985)). As we have explained before, if " *'any* rational trier of fact could have found the essential elements of the crime,' the conviction must stand." *United States v. Badalamenti*, 794 F.2d 821, 828 (2d Cir.1986) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979)).

II. *Sufficiency of the Evidence*

Federal law requires financial institutions to file reports with the Treasury Department of any cash transaction exceeding $10,000. 31 U.S.C. § 5313; 31 C.F.R. § 103.22(a) (1995). Federal law also makes it illegal to structure a transaction for the purpose of evading a financial institution's reporting requirement. 31 U.S.C. § 5324. A person who "willfully" violates the structuring prohibition is subject to criminal prosecution. 31 U.S.C. § 5322.

The Supreme Court recently held that conduct is not "willful" within the meaning of

------- **Page 85 F.3d 909 follows** -------

section 5322 unless the defendant knows that his own conduct is unlawful. *Ratzlaf*, 510 U.S. at ----, 114 S.Ct. at

657. The *Ratzlaf* Court reasoned that because section 5324 itself prohibited *purposeful* structuring and section 5322 authorized prosecution only for *willful* structuring, a prosecution under section 5322 required more than a purpose to circumvent the reporting obligation. *Id.* at ----, 114 S.Ct. at 658. More specifically, the Court reasoned that to avoid rendering the willfulness requirement of section 5322 mere surplusage, section 5322 must be interpreted to require proof that the defendant acted with knowledge that his structuring was unlawful. *Id.* at ----, 114 S.Ct. at 659. Because the district court in Ratzlaf had instructed the jury that the government did not have to prove that the defendant acted with knowledge that structuring was unlawful, the Court reversed and remanded for further proceedings consistent with its opinion. *Id.* at ----, 114 S.Ct. at 663.[3]

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[3] *Ratzlaf* overruled Second Circuit precedent, namely, *United States v. Scanio*, 900 F.2d 485 (2d Cir.1990), under which knowledge of the bank reporting obligation and the intent to evade that obligation provided a sufficient basis for conviction. Although Congress subsequently amended the anti-structuring law to conform to the Scanio interpretation, *see* Riegle Community Development and Regulatory Improvement Act of 1994, § 411, Pub.L. No. 103-325,

Thus, "*Ratzlaf* dealt with an abstract jury instruction in yes or no terms; and in its wake, courts and juries must try to answer more concrete questions," *United States v. Hurley*, 63 F.3d 1, 16 (1st Cir.1995), *cert. denied*, --- U.S. ----, 116 S.Ct. 1322, 134 L.Ed.2d 474 (1996), such as what type and quantum of proof is sufficient to support a reasonable inference of willfulness. In *Ratzlaf* itself, the dissenters opined that the majority's knowledge requirement would make structuring prosecutions "difficult or impossible," 510 U.S. at ----, 114 S.Ct. at 669 (Blackmun, *J.*, dissenting). The majority responded with the unremarkable suggestion that knowledge of illegality can be inferred from evidence of the defendant's conduct. *Id.* at ---- n. 19, 114 S.Ct. at 663 n. 19.

Courts directly and indirectly addressing this issue in the wake of Ratzlaf have concluded that general consciousness of illegality, the method of structuring, and the status of the defendant can support a reasonable infer-

_____(cont'd)

108 Stat. 2160, 2253 (1994) (codified at 31 U.S.C. §§ 5322(a), (b), 5324(c)), *Ratzlaf* governed anti-structuring prosecutions for Simon's conduct, which occurred prior to the amendment. *See also supra* n. 1 (discussing 1992 amendment).

ence of knowledge of illegality. *See Hurley*, 63 F.3d at 16 (concluding that "the thrust of *Ratzlaf*'s wilfulness requirement is met if persons engaged in depositing broken down amounts are generally conscious that their laundering operation is illegal, even if they do not know the precise requirements of the law."); *United States v. Marder*, 48 F.3d 564, 574 (1st Cir.) (stating that the purchase of approximately $10,000 worth of money orders at "three separate banks suggests that [the] defendant had a purpose beyond evasion of the reporting requirement: concealment of his structuring," tending to prove knowledge of illegality), *cert. denied*, --- U.S. ----, 115 S.Ct. 1441, 131 L.Ed.2d 320 (1995); *United States v. Walker*, 25 F.3d 540, 548 n. 8 (7th Cir.) (finding that complex scheme to enlist family members to purchase money orders and cashier's checks in small denominations provided sufficient evidence of knowledge of illegality), *cert. denied*, --- U.S. ----, 115 S.Ct. 371, 130 L.Ed.2d 323 and --- U.S. ----, 115 S.Ct. 531, 130 L.Ed.2d 434 (1994); *United States v. Retos*, 25 F.3d 1220, 1231 (3d Cir.1994) (reversing conviction on improper instruction, but finding that defendant's status provided a sufficient basis to infer knowledge of illegality). However, at least one circuit has criticized such decisions and required evidence of knowledge distinct

from the evidence of structuring itself. *United States v. Wynn*, 61 F.3d 921, 928 (D.C.Cir.1995) (disagreeing with *Marder*, 48 F.3d at 574, and *Walker*, 25 F.3d at 548 n. 8). Yet, the *Wynn* Court apparently agreed that the status of the defendant can support an inference of knowledge of illegality. *Id.* (citing *Retos*, 25 F.3d at 1231, with approval).

We recognize that currency structuring is not so "obviously 'evil' or inherently 'bad'" that the act of structuring itself satisfies the willfulness requirement. *See Ratzlaf*, 510 U.S. at ----, 114 S.Ct. at 662. However, we

------- **Page 85 F.3d 910 follows** -------

also recognize that the *method of structuring* can provide circumstantial evidence of willfulness. As the majority noted in *Ratzlaf*, "[a] jury may, of course, find the requisite knowledge on defendant's part by drawing reasonable inferences from the evidence of *defendant's* conduct." *Id.* ---- n. 19, 114 S.Ct. at 663 n. 19 (emphasis added) (citations omitted). And as we have noted repeatedly, a jury may infer "the state of a man's mind from the things he says and does." *United States v. Sweig*, 441 F.2d 114, 117 (2d Cir.), *cert. denied*, 403 U.S. 932, 91 S.Ct. 2256, 29 L.Ed.2d 711 (1971); *see also United States v. Sheiner*, 410 F.2d 337, 340 (2d Cir.), *cert. denied*, 396 U.S. 825, 90 S.Ct. 68, 24 L.Ed.2d 76 (1969).

[3] In other words, when the method of structuring suggests a significant effort not only to avoid the bank reporting requirements but to *conceal* the currency structuring *itself* from the authorities, *Ratzlaf's* requirement of "something more" is satisfied. 510 U.S. at ----, 114 S.Ct. at 657. Although such conduct may support more than one reasonable inference, the trier of fact may choose between reasonable inferences. In reviewing a claim that the government did not present legally sufficient evidence of willfulness, we need only determine if "*any* rational trier of fact could have found" knowledge of illegality. *Jackson*, 443 U.S. at 319, 99 S.Ct. at 2789.

[4] Moreover, as we have noted in other contexts, "the trier of fact may properly consider the general educational background and expertise of the defendant as bearing on the defendant's ability to form the requisite wilful intent." *United States v. Fletcher*, 928 F.2d 495, 501-02 (2d Cir.) (citations omitted), *cert. denied*, 502 U.S. 815, 112 S.Ct. 67, 116 L.Ed.2d 41 (1991). A jury may infer knowledge of the law from a defendant's education and expertise. *United States v. MacKenzie*, 777 F.2d 811, 818 (2d Cir. 1985) ("Defendants' backgrounds (each had a college degree, Roderick in economics and Malcolm in business) also demonstrate the likelihood they knew what the law required."), *cert. denied*, 476 U.S. 1169, 106 S.Ct. 2889, 90 L.Ed.2d 977 (1986).

[5] We conclude that the evidence presented at trial was sufficient to sustain the defendant's conviction for currency structuring. There was sufficient circumstantial evidence for a rational jury to find that the defendant comprehended the unlawfulness of his structuring.

First, and most importantly, we emphasize that this is not a case like *Ratzlaf*, where the court improperly instructed the jury on willfulness. The district court here instructed the jury that the government was required to prove knowledge of illegality. The government and the defense reminded the jury of that requirement.

Second, the defendant's conduct in this case suggests not only knowledge of the reporting requirements and an intent to circumvent those requirements, but knowledge of illegality as well. *Contrast Ratzlaf*, 510 U.S. at ----, 114 S.Ct. at 657 (describing the defendant's efforts in obtaining cashier's checks from at least ten different banks immediately after learning from casino that it would have to file a report if it accepted $100,000 in cash as repayment of gambling debt). Here, the undisputed evidence of the defendant's structuring--of his method of structuring--supports a reasonable inference that the defendant was attempting to conceal not only his deposits, but also his acts of struc-

turing. In other words, a reasonable jury could infer that the extensive efforts undertaken by the defendant in structuring his cash deposits "undoubtedly [were] based on the knowledge that his conduct was unlawful." *Caming v. United States*, 889 F.Supp. 736, 741 (S.D.N.Y. 1995).

In structuring his deposits of more than $130,000 in cash, the defendant went to eight different branches of Citibank in Brooklyn, Nassau County and Suffolk County on 14 different occasions over a seven day period. On two separate days, Simon went to four different Citibank branches located throughout two different counties. Simon's decision to make all his deposits in different branches of the same bank rather than in different banks may have been made out of carelessness or convenience or lack of knowledge of how branches assemble information for reporting purposes. The extensive effort Simon

------- **Page 85 F.3d 911 follows** -------

did take in structuring these deposits amply supports a reasonable inference that he was attempting to hide his structuring activities because he knew that his conduct was unlawful.

Finally, we note that this defendant is not an unsophisticated person. He was a licensed stockbroker, and he himself was required, as a stockbroker, to file currency transaction reports with the

Treasury Department. *See* 31 U.S.C. § 5315; 31 C.F.R. § 103.11(n)(2) (1995). The jury reasonably could have inferred that this defendant possessed the knowledge and sophistication to understand that his own conduct was unlawful. *Retos*, 25 F.3d at 1231; *see Wynn*, 61 F.3d at 928 (citing *Retos* with approval).

To the extent that defense counsel suggests, as he did at trial, that the defendant was attempting to avoid *filling out* the reporting forms himself, *see* n.1, *supra*, the jury logically could reject that explanation, reasoning that the defendant's structuring conduct entailed considerably more effort in time and travel than what is entailed in completing a currency transaction report. To the extent that defense counsel argues that the defendant was merely attempting to avoid scrutiny of his deposits by the IRS, we observe that he would have had a better chance of achieving this objective if he had used different banks or different account names. The defendant's attempts to conceal his activities amply support a reasonable inference that the defendant knew that his own conduct was unlawful. The appellant, in challenging the sufficiency of the evidence, has not borne his "very heavy burden." *Nusraty*, 867 F.2d at 762 (quoting *Young*, 745 F.2d at 762).

CONCLUSION

For the foregoing reasons, the judgment of the district court is affirmed.

WINTER, Circuit Judge, dissenting:

Respectfully, I disagree with my colleagues as to the sufficiency of the evidence that Simon knew that structuring cash deposits to avoid reporting requirements was illegal. I therefore dissent.

The parties and all members of the panel are in agreement that Simon triggered the obligation of Citibank to report cash transactions exceeding $10,000. 31 U.S.C. § 5313; 31 C.F.R. § 103.22(a) (1995). Indeed, Citibank duly reported Simon's transactions. We also agree that Simon knowingly made separate deposits of under $10,000 in an attempt to evade the daily reporting requirements. 31 U.S.C. § 5324. Simon concedes that he wanted to conceal the aggregate size of the transactions from the government. He readily admitted to that purpose when arrested. What is at issue is whether Simon knew that the structuring of deposits to avoid reporting requirements itself was illegal.

The government paints Simon as a sophisticated stockbroker with knowledge of reporting requirements for currency transactions in excess of $10,000. In its view, Simon conceived of a clever scheme to make separate cash deposits of slightly under that amount at different Citibank branches on the days in question. The very nature of the scheme, the government argues, supports an infer-

ence of Simon's knowledge that structuring was illegal. *See Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994).

The scheme was anything but clever, however, and Simon's understanding of the laws regarding the reporting of cash transactions was hardly sophisticated. Simon's fourteen deposits were all made to *a single account in his own name*. For Simon to have expected that daily deposits totalling over $10,000 would not be detected--the government's, and evidently the jury's, view of his purpose -- he must have been ignorant of the elementary fact that banks tally all deposits during and at the end of the day in order to determine the balance in an account. In short, the government's position is that Simon's sophistication extended to knowledge of the illegality of structuring but did not include a familiarity with bank statements. Discovery of the fact that he had made cash deposits in excess of $10,000 on each of the days in question was thus as inevitable as the sunset. Indeed, the total of the daily cash deposits was reported by the bank, and the government conceded at oral argument that

------- **Page 85 F.3d 912 follows** -------

the reports were precisely what caused Simon's arrest. Far from being a nascent Professor Moriarty, Simon might as well have faxed his deposit receipts to the United States Attorney.

Simon's status as a licensed stockbroker adds nothing to the proof regarding his knowledge of the laws regulating structuring. The government's evidence was only that financial institutions, including stockbrokers, must file reports concerning cash transactions in excess of $10,000. The government offered no evidence as to whether Simon ever received cash from a client, ever filled out such a report, or ever received training as to pertinent statutory or regulatory requirements. The government's proof, in short, was the law itself.

The government's entire case thus rests on inferences to be drawn from Simon's conduct. What is lacking, however, is an explanation of why someone who knew that structuring deposits was illegal would make several cash deposits on the days in question--on one day totaling over $39,000--into a single account in his own name, whether or not separate branches were used.

Simon's conduct is at least as consistent with the lack of knowledge of the illegality of structuring as with that knowledge. Given that his conduct made his arrest inevitable, it is far more consistent with lack of knowledge. When asked at oral argument how Simon's behavior differed from that of a person lacking knowledge of the illegality of structuring, the government speculated

that such a person might make separate deposits at the same branch but at different times during the day. However, such a person might also anticipate that a teller at that branch might recognize the depositor as a repeat customer and ask him to fill out a currency transaction report. Indeed, Simon's post-arrest statement suggested exactly that fear.

My colleagues suggest that the jury could have logically rejected the inference that Simon hoped through his efforts only to avoid having to fill out currency transaction forms himself because structuring "entailed considerably more effort in time and trouble" than filling out the reports. I may misunderstand my colleagues' reasoning, but it seems to me unresponsive. Someone who is ignorant of the illegality of structuring but wants to avoid making a currency transaction report might well spend time and effort in going to different branches to achieve that goal.

I realize that Simon's behavior is more than highly suspicious. He had access to large amounts of cash during very brief periods of time, and the likelihood of some kind of past or future serious criminal activity looms large. However, *Ratzlaf*, in overruling our precedents, requires proof beyond a reasonable doubt that Simon knew that structuring was illegal. The government's proof failed to meet this

standard. Simon's conduct, the sole evidence offered to show such knowledge, demonstrates at best a belief that form--deposits just under $10,000 at separate branches--would prevail over substance--the aggregate deposits in one day--for purposes of the currency transaction rules. This is not an unreasonable or uncommon belief given our tax or regulatory laws. For example, splitting a large monetary gift between two tax years alters the tax consequences, as does the use of relatively meaningless trusts for estate purposes.

Finally, it ill behooves the government to seek a conviction based on flimsy inferences regarding a defendant's knowledge of the details of currency reporting and structuring laws. The government has refused to adopt proposals that the requirements of these laws be posted in banks. 53 Fed.Reg. 7,948 (1988); 54 Fed.Reg. 20,398 (1988). Such ignorance is presumably fostered in order to identify the depositors and to put them under surveillance in order to locate the sources of cash. The government's failure to post such requirements is surely no defense. Nevertheless, the lack of such notices undermines any assumption that the details of the laws are widely known.

I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------x
UNITED STATES OF AMERICA, : CR-94-00735
v. : U.S.Courthouse
MARK SIMON, : Brooklyn, [NY]
Defendant. : May 9, 1995
----------x 11:00 [a.m.]

TRANSCRIPT OF TRIAL.
BEFORE THE HONORABLE CAROL B. AMON
UNITED STATES DISTRICT JUDGE, and a jury.

APPEARANCES:
For the Government: ZACHARY W. CARTER
United States Attorney
By: ERIC CORNGOLD
Assistant U.S. Attorney
225 Cadman Plaza East
Brooklyn, New York 11201
For the Defendant:
STEPHEN LA CHEEN, ESQ.

Court Reporter:
[omitted]

[Ruling on Motion Under Rule 29(a)] [72]

* * * *

THE COURT: I think the standard for Rule 29 is giving full play to the right of the jury to determine credibility, weigh the evidence, draw a justifiable inference of fact, a reasonable mind might fairly conclude guilt beyond a reasonable doubt. It seems like, to me, a jury could reasonably conclude that based on the way in which he conducted these activities that not only did he not want the form to be filed but that he understood that what he was doing was illegal. I think that is an inference they could draw.

You can argue on the other side to the jury that no, the only inference they could draw is that he was trying to

[73] Curreri-redirect Corngold

evade the requirement. His conduct was such that I think the jury could reasonably draw an inference he knew that what he was doing was itself illegal. I'll permit the case to go to the jury. I have to view the inferences in the light most favorable to the government.

Do you have any case you're going to put on, Mr. La Cheen?

* * * *

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

UNITED STATES OF AMERICA, : CR-94-735(CBA)

v. :

MARK SIMON, : Brooklyn, [NY]

Defendant. : August 18,1995

----------X

TRANSCRIPT OF CRIMINAL CAUSE
FOR SENTENCING
BEFORE THE HONORABLE CAROL B. AMON
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Government: Zachary W. Carter
United States Attorney
BY: ERIC CORNGOLD, ESQ.
Assistant [U.S.] Attorney
225 Cadman Plaza East
Brooklyn, New York 11201

For the Defendant: Stephen Robert LaCheen
and Associates
BY: STEPHEN ROBERT LaCHEEN, ESQ.
31st Floor Lewis Tower Building
15th and Locust Streets
Philadelphia, Pennsylvania 19102

Audio Operator: [omitted]

Transcriptionists: [omitted]

[2]

THE CLERK: United States against Simon.

* * * *

THE COURT: I take it that you have renewed your motion for a judgment of acquittal. I've reviewed that motion, and I've reviewed the government's letter objecting to that. As I said at the time, I thought that under Rule 29 there was sufficient circumstantial evidence from which the jury could have concluded that Mr. Simon knew that structuring itself violated the law. I'm still of that view today. I think the case law cited by the government additionally supports that view.

MR. LaCHEEN: Would Your Honor hear me on that ....?

[21]

* * * *

THE COURT: Well, as I said 10 minutes ago, it was the

[22]

Court's view at the time that the circumstances were such and the way that these transactions were conducted, and the defendant's level of sophistication that the circumstances were such that the jury could have inferred that, more than just avoiding a reporting requirement, that the defendant understood that his conduct was illegal. I wouldn't have let the case go to the jury if I hadn't thought that there was a basis to do so, and this

is -- I'm very familiar with this area of law and with the reporting requirements and with the export provisions, and as I say, I'm not going to alter the -- I don't think that there's now a basis to alter the determination that I made at this time. It will make an interesting argument, I take it, in the Court of Appeals.

* * * *

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

GEORGE LANGE III
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the day 25th of July thousand nine hundred and ninety-six

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USA
v Dkt No: 95-1514
Simon

UNITED STATES COURT OF APPEALS
FILED
JUL 25 1996
SECOND CIRCUIT

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by the appellant Mark A. Simon.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
GEORGE LANGE III, Clerk
By: s/Beth J. Meador
Beth J. Meador,
Administrative Attorney

p o ccc
inbancdn_frm